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TRANSPORTATION**

BEFORE THE SENATE INDIAN AFFAIRS COMMITTEE

**ON S. 2283, A BILL TO AMEND THE TRANSPORTATION EQUITY ACT FOR THE
21ST CENTURY TO MAKE AMENDMENTS WITH RESPECT TO INDIAN TRIBES**

Mr. Chairman and Members of the Committee, thank you for the opportunity to appear before you today to testify on S. 2283, "The Indian Tribal Surface Transportation Act of 2000." The Administration has serious concerns regarding several provisions of this bill, which I will discuss. However, I also appreciate the opportunity this hearing affords to provide a brief background on the Department of Transportation's (DOT) Indian Reservation Roads (IRR) program of the Federal Lands Highways Program (FLHP), and an update on our progress in implementing provisions in the Transportation Equity Act for the 21st Century (TEA-21) affecting the IRR program.

BACKGROUND

The IRR system provides access to and within Indian reservations, Indian trust land, restricted Indian land, and Alaska Native villages. These roads link Native American housing, schools, emergency services, and places of employment. An adequate system of roads and bridges is a key element of economic development on tribal lands.

More than 2 billion vehicle miles are traveled annually on the IRR system, although it is among the most rudimentary of any transportation network in the United States. Over 66 percent of the system is unimproved earth and gravel and approximately 26% of IRR bridges are deficient. These conditions make it very difficult for residents of tribal communities to travel to hospitals, stores, schools, and employment centers. The poor road quality also affects safety. The annual fatality rate on Indian Reservation Roads is more than four times the national average.

TEA-21 reaffirmed the Federal Government's commitment to providing safe and efficient transportation for Indian lands by authorizing \$1.6 billion in funding for the IRR program for fiscal years 1998-2003. TEA-21 also strengthened the commitment of the Federal Government to increasing the involvement of Native Americans in transportation programming and planning. For example, TEA-21 clarified that funds under the IRR program shall be available to tribal governments from the Bureau of Indian Affairs (BIA) for direct contracting of transportation projects. TEA-21 also required the development of an IRR program funding formula and regulations through a negotiated rulemaking procedure that reflects the unique government-to-government relationship between the Indian tribes and the United States.

Increasing Tribal Involvement

The Department of Transportation is committed to building more effective day-to-day working

relationships with Indian tribal governments reflecting respect for the rights of self-government and self-determination, based on principles of tribal sovereignty.

A DOT Order delineating policy for working with tribal governments was issued on November 16, 1999, during Native American Heritage Month. This Order implements President Clinton's Memorandum on Government-to-Government Relationships with Native American Tribal Governments and his Executive Order No. 13084, "Coordination and Consultation with Indian Tribal Governments." The Order is to ensure that the DOT's programs, policies, and procedures are responsive to the needs and concerns of American Indians, Alaska Natives, and Tribes. The Order emphasizes communication with tribes and tribal representation in relevant DOT activities.

Transportation Planning Procedures

The Federal Highway Administration (FHWA) and the BIA, in consultation with tribal governments, have developed the "Indian Reservation Roads Program Transportation Planning Procedures and Guidelines" (TPPG). The TPPG has been widely distributed to the tribes as guidance on transportation planning. Currently, FHWA is drafting a regulation consistent with this guidance for IRR transportation planning procedures and management systems, as required in 23 U.S.C. Section 204(a)(2).

The TPPG clarifies policies related to funding issues and eligible activities and defines the relative transportation planning roles and responsibilities of the BIA and Indian tribal governments. The TPPG is a valuable tool for tribes entering into planning activities with other tribes, as well as with State and local governments.

IRR Bridge Program

There are two categories of bridges covered under the IRR Bridge program-BIA and non-BIA owned. Approximately 23 percent of the 779 bridges owned by the BIA are deemed deficient, as are 27 percent of the 3,006 State and locally owned non-BIA bridges. Section 1115 of TEA-21 amended title 23, U.S.C., to require the Secretary to establish a nationwide priority program for improving deficient IRR bridges, using a set-aside of not less than \$13 million of IRR funds per year.

An Indian Reservation Roads Bridge Program (IRRBP) Federal Register Notice was published on February 12, 1999, soliciting comments on project selection and fund allocation procedures. An Interim Final Rule (IFR), delineating the project selection and final allocation procedures for the IRRBP and requesting comment, was published on July 19, 1999. FHWA will operate under the IFR, but will continue to evaluate the comments received and the operation of the program set forth in the IFIL.

During fiscal year 1999, 11 deficient IRR bridge projects were submitted. All 11 were found eligible and were funded, using approximately \$8.9 million of the IRRBP funds. An unspent balance from FYs 1998 and 1999 of approximately \$17 million in bridge funding was carried over into FY 2000. In FY 2000, \$1.5 million of bridge funding has been allocated thus far for 6 eligible

deficient IRR bridges.

In cooperation with the BIA and the Tribal Technical Assistance Program (TRAP) Centers, FHWA conducted eleven training sessions on the IRR bridge program procedures from October 1999 to May 2000. Indian tribal governments were encouraged to develop plans, specifications, and estimates (PS&Es) for deficient IRR bridges and to apply for funding for rehabilitation or replacement. The BIA is using approximately \$4.2 million of FY 2000 supplemental IRR funds toward design work for the rehabilitation or replacement of 127 deficient IRR bridges. When these bridge projects are completed and funded, they will account for the unobligated IRR Bridge program funds.

Negotiated Rulemaking

Section 1115 of TEA-21 required the Secretary of the Interior to establish an IRR funding formula and IRR program regulations using negotiated rulemaking with Indian tribal governments. After early initial meetings with the FHWA, the BIA: (1) hired the Federal Mediation and Conciliation Service to facilitate the rulemaking; (2) established a process for selecting tribal representatives for the committee; (3) developed an agenda for an informational meeting with Indian tribal governments; and (4) established the 42-member rulemaking committee.

Secretary Slater designated three FHWA employees to serve on the rulemaking committee and work groups. Six full committee meetings have been held since the October 20, 1999, Senate Indian Affairs Committee Hearing, and the committee is meeting this week in Green Bay, Wisconsin. In addition, all of the four work groups of the committee have held additional meetings. Although the committee has not yet completed its work, most of the issues have been analyzed and regulations drafted in "question and answer" format. The formula work group is currently working on various fund distribution formulas. The Department of Transportation remains fully committed to providing the necessary staff and IRR funding for this rulemaking and is looking forward to its successful completion.

S. 2283

With this overview of the IRR program, I now would like to turn to S. 2283. The bill contains three significant provisions under section 2 that raise serious concerns.

Section 2(a) This provision adds the Indian Reservations Road program to the list of programs exempt from the Obligation Limitation imposed on Federal-aid highway programs in section 1102 of TEA-21. We do not support exempting IRR funds from the obligation limitation and thereby creating additional mandatory spending. Taking these funds outside the TEA-21 guarantees would raise total highway spending and reduce the budget surplus unless there is an offset. We do not support amending TEA-21 to undo the TEA-21 guarantee.

To increase resources for the IRR program, the Administration, in its FY 2001 budget, proposed that the IRR program be included among the programs under section 1102(c)(1) of TEA-21 for

which obligation limitation is set aside in order to provide 100 percent of the funding authorized for the program. This proposal would return 100 percent funding to the IRR program, and offset the increased funding availability for the IRR program with reduced funding availability for other Federal-aid highway program components. It would not affect the funding for non-highway DOT programs. Moreover, in its FY 2001 budget, the Administration proposed that an additional \$75 million be made available to the IRR program from Revenue Aligned Budget Authority (RABA) funds, in addition to formula RABA funds.

We note the Senate FY 2001 DOT Appropriations bill provides an additional \$33.6 million for the IRR program from funds appropriated for the FHWA administrative expenses.

We support the Senate provision.

Between FY 1983 and FY 1997, the FLHP received 100 percent obligation limitation each year equal to its new and carryover funds. The impact of obligation limitation on the IRR program was changed by TEA-21. Under section 1102 of TEA-21, the IRR program now receives obligation limitation for new funds using the same ratio that is applied to other allocated programs. To comply with section 1102(b), the amount of contract authority for the IRR program in excess of the available obligation limit is pooled with other similar funds and redistributed to the States. Approximately \$91 million total of IRR contract authority was redistributed for FYs 1998, 1999, and 2000. Even with the increased resources provided in TEA21, the partial loss of authorized funds-potentially a loss of in excess of \$192 million over the life of TEA-21-has a significant impact on the IRR program.

Section 2(b) Another provision of S. 2283 would amend section 202 of title 23 by authorizing a demonstration project for which the Secretary of Transportation may select up to 12 tribes. The intent of this amendment is not completely clear, but could be interpreted to mean that upon request of a tribe selected, the Federal Lands Highway Program could be required to make funds for the Indian Reservation Roads program directly available to the tribe. The tribal government could then enter into contracts in accordance with P.L. 93-638, the Indian Self-Determination and Education Assistance Act (Self-Determination Act).

Federal oversight is necessary and desirable when taxpayer funds are invested in infrastructure projects through the Federal-aid highway program. Though Congress made clear in section 145 of title 23, U.S.C., that the sovereign rights of States to determine which projects shall be Federally funded are protected, the FHWA has a history of working to develop competent, capable organizations prior to delegation of program responsibilities. In section 302 of title 23, U.S.C., Congress required that States participating in the Federal-aid highway program must have a "suitably equipped and organized" department to carry out the duties required under title 23. We believe that it would be wise to assure that any tribe selected for participation under the pilot program should also have established a "suitably equipped and organized" department. Unlike the applicant pool requirements in Title III of the Self-Determination Act, the proposed demonstration project applicant pool requirements in S. 2283 would not require a tribe to have any experience in the IRR Program nor to have successfully completed one or more IRR projects or contracts.

Currently, the FHWA and the BIA have authorized two Self Governance agreement pilots with tribal governments. The pilot being conducted with the Red Lake Band of Chippewa Indians in Minnesota began in FY 1999 and the pilot with the Cherokee Nation in Oklahoma in FY 2000. Both pilot agreements include provisions allowing FHWA/BIA to review the quality of the work performed, monitor health and safety, and provide technical assistance when needed. The results of these two pilots will provide direction concerning tribal project oversight, along with identifying any unforeseen operation or process problems.

FHWA believes that these Self Governance pilot activities we already have underway can accomplish many of the same goals of the pilot program proposed in S. 2283.

With the entire administration of the Indian Reservation Road program subject to change as a result of the Negotiated Rulemaking Process stipulated in TEA-21, we believe that proposed changes to the program contained in S. 2283 should be deferred until the Negotiated Rulemaking process is completed. Any change in the distribution of funds could harm the development of the formula for IRR funds. The current target date for issuance of the final rule is early calendar year 2001.

Section 2(c) A third major provision of S. 2283 would place a cap of 6 percent of the contract authority amounts made available from the Highway Trust Fund to the BIA, for its administrative expenses related to the IRR program and to individual projects. This subsection further states that such administrative funds are to be made available to tribal governments upon request to be used for the associated administrative functions assumed by the Indian tribe pursuant to the Self-Determination Act.

Section 2(c) would also limit the Federal Government's ability to review construction plans and specifications to check for health and safety considerations. This would affect all Federally funded construction projects performed by tribes under the Self-Determination Act. Under section 2(c), tribes would be able to assure that proposed construction is in accordance with health and safety standards without requiring concurrence or approval by the agency with jurisdiction for the road or bridge. This provision is requiring the Federal Government to "trust" but not be able to "verify" the safe design and construction of highways, bridges, and other facilities serving Indian lands and communities.

Because the majority of the improvements funded under the IRR program involve roads and bridges under the jurisdiction of BIA, FHWA believes it is necessary to have BIA concurrence that the proposed construction meets all health and safety standards prior to the use of IRR funds.

Conclusion

To conclude, we are working to implement the IRR provisions of TEA-21 as quickly and effectively as possible, and are committed to working with Indian tribal governments and the BIA to improve program delivery. We recognize that transportation is a critical tool for tribes to improve the quality of life in their communities and that there are still many challenges to

overcome. That is why we are urging appropriations to provide the full \$350 million we requested in the President's FY 2001 budget submission for transportation services to Native Americans. We take very seriously the concerns regarding the IRR program voiced by tribal representatives at the hearing last October before this Committee, and in other forums, and we will continue to do our best to meet tribal expectations. In doing so, we will consider alternative ways of doing business that can improve our program delivery. On behalf of the Department of Transportation, I look forward to working with Congress on these important issues.

Mr. Chairman, thank you for the opportunity to present this testimony. I will be glad to answer any questions you or other Committee Members may have.